

No. 64852-7-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PAUL BRECHT,
APPELLANT,

v.

FISHER COMMUNICATIONS, INC., JOHN CARLSON and JANE
DOE CARLSON, and KEN SCHRAM and JANE DOE SCHRAM,

RESPONDENTS,

MARK DOE and JANE DOE, CHRIS DOE and JANE DOE,
and CHRIS MORGAN and JANE DOE MORGAN,

DEFENDANTS.

APPEAL FROM THE SUPERIOR
COURT OF KING COUNTY

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. The court erred in ruling on December 29, 2009 that it was allowable for the Fisher Defendants to falsely accuse Mr. Brecht of being a 'notorious wife beater with multiple assault convictions' when the record shows he has only been convicted of violating a no contact order.
2. The trial court erred in ruling that there was no actual malice in granting the summary judgment motion of the Fisher Defendants on December 29, 2009.
3. The trial court erred in ruling on December 29, 2009 that call-in radio talk shows such as Fisher Broadcasting's "The Commentators" are held at a different legal standard with regards to defamation than shows involving investigative reporting.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling on December 29, 2009 that it was allowable for the Fisher Defendants to falsely accuse Mr. Brecht of being a 'notorious wife beater with multiple assault convictions' when the record shows he has only been convicted of violating a no contact order?
2. Did the trial court err in ruling that there was no Actual Malice in granting the Summary Judgment Motion of the Fisher Defendants on December 29, 2009?
3. Did the trial court err in ruling on December 29, 2009 that call-in radio talk shows such as Fisher Broadcasting's "The Commentators" are held at a different legal standard with regards to defamation than shows involving investigative reporting?

C. STATEMENT OF THE CASE

Appellant Paul Brecht was a local electrician, friend and campaign volunteer for Richard Pope during the 2007 election campaign for the 6th District King County Council seat held by incumbent Jane Hague. (CP 277, 278) Mr. Brecht endorsed Mr. Pope in a campaign mailer stating, “People are always saying: ‘why can’t we get more decent, capable and honest leaders in politics’- here’s our chance - vote for Richard Pope.” (CP 304) In response to this mailer, the Jane Hague campaign consultants and legal counsel lead by Brett Bader and Mark Lamb, created a mailer of their own stating that: “Paul Brecht tops Pope’s endorsement list. Brecht also tops law enforcement’s list with multiple domestic violence arrests and at least one assault conviction.” (CP 306) As found in the subsequent defamation trial in King County Superior Court, case # 07-2-34389-0 SEA, which resulted in a Jury finding for defamation against Hague et al. (CP 349) Mr. Brecht was never on any law enforcement list, and was never convicted of assault. The facts of that case showed Mr. Brecht had only been convicted of violating a no contact order during a dissolution proceeding by meeting his then wife at the Southcenter Mall to give her money and so he could see his child. (CP 347) The Defendants in this case have relied upon declarations from Mr. Brecht’s former wife filed during the dissolution. (CP 197) However, they did not include any exculpatory evidence contained in the same proceedings (CP 327-341), nor did they include the final judgment from the dissolution court exonerating Mr. Brecht from any domestic violence. (CP 324-326)

The defendants in the case

John Carlson - Is employed at Fisher Communications as a talk show host for "The Commentators" radio show on Seattle radio station KVI 570 and invited Pope on the October 30, 2007 show. (CP 288)

Ken Schram - Is employed at Fisher Communications as a talk show host for "The Commentators" radio show on Seattle radio station KVI 570 and invited Pope on the October 30, 2007 show. (CP 296)

Mark Doe - Mark Doe is the first caller on the radio show. To this date, he has not been identified.

Chris Doe - Chris Doe is the second caller on the radio show and has been identified by the mother of Chris Morgan as her son. (CP 302) Chris Morgan was a campaign worker for the Hague campaign and was present during the campaign meeting where the radio show was listened to. Since he has been identified as the second caller on the show, his call would have taken place during the campaign meeting where Brett Bader and other campaign members were present. During depositions, Bader, Morgan, and others falsely denied that they knew the identities of the callers. (CP 284-286)

Mr. Bader was the campaign manager for the Jane Hague Campaign. (CP 284-286) Mr. Carlson and Mr. Bader have been close friends for nearly 30 years. They met each other as students and became friends during college

in 1980. (CP 294) In 1985 they, along with another individual, started an organization called the “Washington Institute for Policy Studies.” (CP 294) After College, Mr. Carlson had been a client of Mr. Bader’s communications firm. (CP 294) They worked together on the “Three Strikes You’re Out” initiative. They worked together on the I-200 initiative to ban affirmative action. Mr. Bader also worked for Mr. Carlson during his campaign for Washington Governor in the 2000 election. (CP 294)

Mr. Bader testified that he did not recall having a meeting with Mr. Carlson prior to the radio show in October of 2007. (CP 286) Mr. Carlson testified in his declaration that he did have a meeting with Mr. Bader, but denied that he agreed to help Mr. Bader in any way. (CP 291)

On the day following the filing the Hague defamation lawsuit, October 30, 2007, Mr. Pope was invited to speak during the first hour of the Fisher Communication’s KVI-570 AM Radio Show, “The Commentators.” (CP 237-274) It was during this show that Mr. Brecht was repeatedly defamed by both the show’s hosts: John Carlson and Ken Schram, and also by two callers, Mark Doe and Chris Morgan (a Hague campaign worker). (CP 286) There is no material difference between the defamatory comments at issue in the Hague defamation lawsuit, and those at issue in the present Fisher Communications defamation lawsuit. In fact, the defamatory comments are worse in the Fisher lawsuit in that Mr. Brecht was accused of being a “wife beater” instead of merely have been convicted of assault.

The defamatory comments made by the callers, and agreed to by Mr. Carlson and Mr. Schram, nearly mirror those made by Mr. Bader and the Hague campaign. There was a pattern of behavior that was transferred from the Hague campaign mailer to what was stated on the radio show. (CP 305-306) It was later learned the second caller on the radio show was actually a Hague campaign worker. (CP 302) The identity of the first caller has not yet been determined. The juxtaposed defamatory statements by the defendants stated that Mr. Brecht is a ‘notorious wife beater with multiple assault convictions.’ (see Section 1.1 ‘Falsity’ beginning on page 9 of this brief)

Defamatory Statements Broadcast Throughout The Puget Sound Area on Fisher Broadcasting’s “The Commentators” on October 30, 2007:

1. John Carlson re-broadcasts the defamatory mailer: (CP 252)

MR. CARLSON: And Jane Hague has sent out a flyer: “Voter alert: Paul Brecht tops Richard Pope’s endorsement list. Brecht also tops law enforcement’s list with multiple domestic violence arrests and at least one assault conviction.” He has been arrested for domestic violence, but I guess it’s questionable whether he’s got the conviction, is that it?

2. Caller Mark Doe Makes defamatory statements which John Carlson agrees to: (CP 257-258)

MR. CARLSON: We’re gonna start out here in Bellevue with Mark. Mark, you’re on the commentators AM 570 KVI. Good to have you with us.

MARK: Thank you, John. I find myself in the unusual position of actually agreeing with Ken Schram. I think that this is an odd individual in Richard Pope. And the fact that he chose, as his primary endorser, a man who had been convicted of domestic violence is just bizarre to me. I think that shows somebody who doesn't have a lot of support in the community. Richard has made a career out of attacking other people. And when -- it seems like when the shoe is on the other foot and it starts to pinch, he gets angry and files

another frivolous lawsuit. I think that's very unfortunate. And I'll tell ya, he has attacked a lot of good people over the years, including you, John.

MR. CARLSON: Yes.

3. Caller Mark Doe Makes more defamatory statements which John Carlson agrees to: (CP 258)

MARK: And I think that's unfair. I think he needs to be held accountable. And I'm glad nobody took him seriously before. But the stuff that Richard has done in defending men who beat their wives, he's finally being held accountable. And I think that's a good thing. And I think that's something that the people of this district should know.

MR. CARLSON: All right. Well, let's give him a chance --

4. Caller Mark Doe Makes more defamatory statements which Ken Schram agrees to: (CP 259-260)

MARK: Mr. Brecht was convicted of domestic violence, Mr. Pope, and you know that's the truth because you were his lawyer, like you are for a lot of men who

MARK: -- rough up their wives.

MARK: He was convicted of domestic violence. Is that true or untrue?

MARK: Is that true or untrue?

MARK: He was convicted of a domestic violence offense.

MARK: And you've defended wife beaters for the last sixteen years, Richard.

MARK: And you're being held accountable for it. And that's the right thing to do.

MARK: And he's your main endorser, and the guy has a domestic violence conviction and he's vouching in that mail piece for your integrity.

MARK: He's the only person you can find to vouch for your integrity and he has a domestic violence conviction.

MARK: You ought to be ashamed of yourself.

MR. SCHRAM: All right. Let's give Mr. Pope a chance to respond now.

5. Caller Chris Morgan makes defamatory statements which John Carlson agrees to: (CP 264)

MR. CARLSON: Okay, let's go to Chris. Chris, you're on with John Carlson, Ken Schram, Richard Pope. Go for it.

CHRIS: How you guys doing? You know, I was just listening to Richard talk about his top three issues, which are transportation, affordable housing and public safety. The funny thing is Jane Hague is endorsed by the transit union drivers, the Affordable Housing Council, and the jail guards. Pope doesn't seem to have a leg to stand on anything. He's got no endorsements but for this one guy, Paul Brecht, who not only is an endorser, but was quoted in the Times as a campaign worker. So not only is Richard running around with this guy, he's got him working on his campaign, and he's pretty much a woman beater. Now we can debate the finer points of actually his conviction, or you know, it got punted in the legal system.

MR. CARLSON: Right.

6. Caller Chris Morgan makes more defamatory statements which John Carlson agrees to: (CP 265)

CHRIS: But the guy is not exactly upstanding. And it's just -- it's so illustrative of Richard's whole career that -- look at the people he runs with, what does he accomplish? Pretty much nothing. And now he's just grasping on anything that he thinks will win him points with the voters. And look at this interview. You know, he's got nothing to talk about by himself. Look at the issues. Jane's been killing it and he's a nobody.

MR. CARLSON: All right. Richard?

7. The Defendants Made Numerous Disparaging Statements About Mr. Brecht And Associate Mr. Brecht To Mr. Pope:

MR. CARLSON: All right. Here, basically is what your opponent is saying about you. You're a nut. You're unstable. Uh, you don't like women. You're volatile. You're unqualified. What do you say to that? (CP 248)

MR. SCHRAM: So now who's this guy that you're representing that's now suing Jane Hague for libel? (CP 250)

MR. CARLSON: Yeah, I have it in front me here. The gentleman's name is Paul Brecht. (CP 251)

MR. SCHRAM: Well, his name used to be something different than what it is now. (CP 252)

MR. CARLSON: Right. And he is on your flyer as endorsing you. (CP 252)

MR. SCHRAM: Is it -- under which name? Under any name, or just the one that he currently has? (CP 252)

MR. SCHRAM: But were there not other court appearances under his former name? (CP 252-253)

MR. SCHRAM: I think Richard's wacko. I do. (CP 256)

MARK: ...I think that this is an odd individual in Richard Pope. And the fact that he chose, as his primary endorser, a man who had been convicted of domestic violence is just bizarre to me. (CP 257)

MARK: ...But the stuff that Richard has done in defending men who beat their wives, he's finally being held accountable. (CP 258)

MARK: Mr. Brecht was convicted of domestic violence, Mr. Pope, and you know that's the truth because you were his lawyer, like you are for a lot of men who -- (CP 258)

MARK: -- rough up their wives. (CP 259)

MARK: And you've defended wife beaters for the last sixteen years, Richard. (CP 259)

MARK: And he's your main endorser, and the guy has a domestic violence conviction and he's vouching in that mail piece for your integrity. (CP 260)

CHRIS: So not only is Richard running around with this guy, he's got him working on his campaign, and he's pretty much a woman beater. (CP 264-265)

CHRIS: But the guy is not exactly upstanding. And it's just -- it's so illustrative of Richard's whole career that -- look at the people he runs with, what does he accomplish? Pretty much nothing. (CP 265)

King County Superior Court Judge Michael Trickey dismissed Mr. Brecht's defamation lawsuit against Fisher Communications, Mr. Carlson, Mr. Schram, and others on summary judgment on December 29, 2009 (CP 360-362). Mr. Brecht now asks the Court of Appeals to reverse this order.

D. ARGUMENT

1. The Fisher Defendants Broadcasted Highly Damaging False Statements Causing Severe Injury To Mr. Brecht.

The trial court stated in its ruling:

“It's a little closer on the other issue where one of the radio commentators is reading from a campaign brochure. When you look at the give and take in the dialogue, I suppose it could go either way. You could probably argue to a jury that they were sort of agreeing with that and republishing that. On the other hand, at the time that these statements were made, Mr. Brecht did have the conviction for violation of a no contact order, and his ex-spouse had made allegations that there was violence during the marriage. So, the statements may still have been way over the top and defamatory, but they were not made with actual malice. I have to apply that fixed standard under the law.” Summary Judgment Hearing transcript. 12/29/2009 (RP 42)

1.1 Disproving The Defamatory Allegations - Falsity

The trial court appears to say that, since Mr. Brecht has a conviction for violation of a no contact order, that made it acceptable for the Fisher Defendants to republish the defamatory mailer on the air and that they did so without actual malice. Mr. Brecht respectfully disagrees.

It is a fact that Mr. Brecht had a conviction for violating a no contact order, it is absolutely false that he was convicted of beating his wife as was stated on the radio show. To equate the two or to justify that it was acceptable for the Fisher Defendants to impute a crime where none was committed does not meet the standard of the law. In a defamation by implication case, such as this, there is significantly greater opprobrium attached by saying one is a ‘notorious wife beater with multiple assault

convictions' versus one who violated a no contact order with no allegations of violence. (CP347) The "sting" of the Fisher Defendants' report was that Mr. Brecht was a 'notorious wife beater with multiple assault convictions:

"A defendant in a defamation action may obtain summary judgment by showing that the story's "sting" is true. Mark, at 494. The "sting" is the gist of the story as a whole, and is only altered when "significantly greater opprobrium" attaches to the false statement than it would to the truth. *See Mark*, at 496. Inaccurate reporting is not defamatory unless by altering the "sting" it creates a materially different impression on the reader."

Herron v. King Broadcasting, 109 Wn.2d 514, 522, 746 P.2d 295 (1987).

Mr. Carlson and Mr. Schram stated in their motion for summary judgment that it is acceptable to state Mr. Brecht is a wife beater because his former wife stated it in their dissolution record. (CP 196-197) This is absolutely false. One is not guilty of a crime unless it has been so judged in a court of law:

"The Supreme Court has held that "inaccurate and defamatory reports of facts" drawn from judicial proceedings are not deserving of First Amendment protection. Time, Inc. v. Firestone, 424 U.S. 448, 457, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976).

Mark v. King Broadcasting, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981)

It is unconscionable that a major broadcasting company would take partial excerpts from someone's dissolution case file - excluding the court's final judgment and all the exculpatory evidence - and broadcast them throughout the Puget Sound area as if they were absolute fact! (CP 196-197, 237-275)

What the Fisher Defendants did was a calculated attack on Mr. Brecht's reputation with falsity and actual malice. Therefore, the republication of the defamatory campaign mailer should be considered as one more element, along with all the several cumulative instances of agreement with the callers' statements and other instances in this brief, of circumstantial and direct evidence for actual malice.

The Fisher Defendants purposely omit that there was no violence involved in the 'domestic violence conviction' because it would have detracted from the theme of their attack: that Mr. Brecht was a notorious wife beater with multiple assault convictions, and that Mr. Pope was a defender of wife beaters and therefore not worthy of being elected to public office. The Fisher Defendants purposely and falsely juxtaposed statements to portray Mr. Brecht as a convicted wife beater:

"A broadcaster's omission of facts may be actionable if it so distorts the viewers' perception that they receive a substantially false impression of the event"

Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 425 (Tex. 2000)

Falsity can be determined according to the standards as set forth in the Washington State Supreme Court case: Mohr v. Grant, 153 Wn.2d 812, 108 P.3d 768 (2005):

In Mohr v. Grant the Washington Supreme Court stated:

"Defamation by implication occurs where "the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts."

Mohr v. Grant, 153 Wn.2d 812, 823, 108 P.3d 768 (2005)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, Callers “Mark” and “Chris” made several statements that juxtaposed a series of facts so as to imply a defamatory connection between them and created a defamatory implication by omitting important facts. The requirement for this element of falsity is one or the other, however the Fisher Defendants’ actions satisfy both the implication and omission alternative elements:

MARK: ...And the fact that he chose, as his primary endorser, a man who had been convicted of domestic violence is just bizarre to me. (CP 257)

MARK: ...But the stuff that Richard has done in defending men who beat their wives, he’s finally being held accountable. And I think that’s a good thing. (CP 258)

MARK:...Mr. Brecht was convicted of domestic violence, Mr. Pope, and you know that’s the truth because you were his lawyer, like you are for a lot of men who -- (CP 258)

MARK: -- rough up their wives. (CP 259)

MARK: He was convicted of domestic violence. Is that true or untrue? (CP 259)

MARK: He was convicted of a domestic violence offense. (CP 259)

MARK: And you’ve defended wife beaters for the last sixteen years, Richard. (CP 259)

MARK: And he’s your main endorser, and the guy has a domestic violence conviction and he’s vouching in that mail piece for your integrity. (CP 260)

MARK: He’s the only person you can find to vouch for your integrity and he has a domestic violence conviction. (CP 260)

The Fisher Defendants juxtaposed the statements “convicted of domestic violence” with the statements of “men who beat their wives” and

“men who rough up their wives” and “wife beaters”. The inference to be drawn is unmistakably clear: that Mr. Brecht is a convicted wife beater.

Considered as a whole, these statements leave an unmistakable impression in the mind of the audience that Mr. Brecht was convicted of a crime involving physical violence toward his former wife.

The second caller, “Chris” does remarkably the same thing by juxtaposing “he’s pretty much a woman beater” with some discussion of Mr. Brecht’s conviction. Showing yet one more time a similar pattern of conduct among the defendants in this case and that with Mr. Bader and the Hague campaign: (CP 305-306)

CHRIS: and he’s pretty much a woman beater.

CHRIS: Now we can debate the finer points of actually his conviction, or you know, it got punted in the legal system.

Again, Mr. Carlson and Mr. Schram are on record with agreeing with each of the callers defamatory statements and implications (CP 257-260, 264-265). In the five times they responded to the callers statements, their only response to these false implications and omissions are: “Yes”, “All Right”, “All Right”, “Right” and “All Right.” They fail to make any comments that would be considered curative or otherwise alter the false implication created by the callers. Furthermore, their omission of facts that would correct these false implications is conspicuously absent.

This is sufficient probative evidence to support a finding of falsity as to this element and for a jury to conclude that the Fisher Defendants' statements are false.

Next, the Mohr v. Grant court states:

"This court has stated the plaintiff must show the statement is provably false, either in a false statement or because it leaves a false impression.

Mohr v. Grant, 153 Wn.2d 812, 825, 108 P.3d 768 (2005)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance:

1. To state Mr. Brecht was convicted of domestic violence is false because it leaves a false impression. There are crimes under Washington State's Domestic Violence Statutes that do not involve violence and violation of a no contact order is one of them. By stating Mr. Brecht was convicted of domestic violence, and by omitting the facts surrounding Mr. Brecht's no contact order conviction - that there were no allegations of physical violence involved - or by omitting the fact that the statute includes crimes not involving violence - a false impression was left in the mind of the listeners that Mr. Brecht was indeed convicted of physical violence towards his former wife. (CP 257-260, 264-265)

2. To state Mr. Brecht is a wife beater or woman beater is false because it is a false statement. No court ever judged Mr. Brecht as a wife beater or any physical violence and therefore this statement is provably

false. There are no court judgments anywhere that would support the defendants' false allegations that Mr. Brecht is a wife beater.

3. To state Mr. Brecht is a convicted wife beater is also provably false because again, there are no court judgments anywhere that would support the Fisher Defendants' false allegations that Mr. Brecht is a convicted wife beater.

This is sufficient probative evidence to support a finding of falsity as to this element and for a jury to conclude that the Fisher Defendants' statements were false.

Next, the Mohr v. Grant court states:

"The 'sting' of a report is defined as the gist or substance of a report when considered as a whole." Herron, 112 Wn.2d at 769. In applying this test, we require plaintiffs to show that the false statements caused harm distinct from the harm caused by the true portions of a communication:

Mohr v. Grant, 153 Wn.2d 812, 825, 108 P.3d 768 (2005)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, by taking the defamatory statements as a whole:

"Voter alert: Paul Brecht tops Richard Pope's endorsement list. Brecht also tops law enforcement's list with multiple domestic violence arrests and at least one assault conviction." (CP 305-306)

"Convicted Of Domestic Violence," (CP 257-260) "Wife Beater"(CP 257-260) "Woman Beater" (CP 264-265)

The gist is that: ‘Mr. Brecht is a notorious wife beater with multiple assault convictions.’ The radio show transcript is devoid of any true portions of the communication - a requirement in the Mohr v. Grant court - and therefore there is no comparative or distinct harm. The actual harm is that Mr. Brecht was falsely accused of being convicted of several violent crimes.

However, if the court were to consider that Mr. Brecht was convicted of violating a no contact order, in comparison to being a ‘notorious wife beater with multiple assault convictions’, then there is a football field of distinction here. However, the Mohr v. Grant court states that the true portions must come from the defendants’ communications and again the record is void of any.

Furthermore, the Fisher Defendants have failed to meet their burden by showing that the statements are substantially true. Indeed they can not.

This is sufficient probative evidence to support a finding of falsity as to this element and for a jury to conclude that the Fisher Defendants’ statements are false.

Next, the Mohr v. Grant court states:

“What is necessary is a provably false impression which is contradicted by inclusion of omitted facts.”

Mohr v. Grant, 153 Wn.2d 812, 827, 108 P.3d 768 (2005)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, the false impression of the communications is that Mr. Brecht was a ‘notorious convicted wife beater with multiple assault convictions’. Facts that would have contradicted this are 1) that Mr. Brecht was convicted of violating a no contact order (CP 347) where no physical violence was alleged, and 2) that the allegations he was a wife beater came from his former wife during a dissolution proceeding and no court ever found him guilty as doing such.

Finally, the Mohr v. Grant court states:

A media defendant in a defamation action cannot be held accountable for omissions of fact from a report if the facts were denied to the defendant at the time the report was made.

Mohr v. Grant, 153 Wn.2d 812, 829, 108 P.3d 768 (2005)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, here, the court requires that documents required to be relied upon be available. Mr. Brecht’s dissolution was finalized in 2002. (CP 326) The record is found by performing a Washington Court Record Search and therefore this element does not apply to this case.

1.2 The Fair Report Privilege Does Not Apply

In all, Mr. Carlson and Mr. Schram cite two different judicial proceedings where defamatory language was rebroadcast from or reported on by them. First, was their report on Mr. Brecht’s dissolution when they agreed with the defamatory statements made by the callers. (CP 257-260,

CP 264-265) They did not establish a privilege for this in any of their pleadings and therefore none should be allowed. Moe v. Wise, 97 Wn. App. 950, 963, 989 P.2d 1148 (1999).

The second “judicial proceeding” cited by Mr. Carlson and Mr. Schram was from the Brecht v. Hague lawsuit complaint. They rebroadcast the defamatory campaign mailer and claim it was read, “solely for the purpose of questioning Richard Pope's involvement with the Hague case.” (CP 430) They further claim that reading of the defamatory Hague campaign mailer was privileged. (CP 430)

The Washington Court of Appeals in Alpine v. Cowles stated:

“Accordingly, to determine whether a communication falls within the fair reporting privilege, we engage in two inquiries: (1) whether the report is attributable to an official proceeding; and (2) whether the report is accurate or a fair abridgement. RESTATEMENT OF TORTS 2nd, § 611 comments d, e, f.

Alpine v. Cowles, 114 Wn. App. 371, 385, 57 P.3d 1178 (2002)

The Alpine v. Cowles court citing RESTATEMENT OF TORTS 2nd, § 611 comment e, states what is an official proceeding:

e. “Necessity of official action in judicial proceedings. A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section...”

Since the defamation lawsuit of Brecht v. Hague had just been filed the day before the radio show (CP 308), official action had not been taken by the officer or body whose proceedings are thus reported.

Therefore it could not have been considered an official proceeding, and the Fair Report Privilege does not apply.

The court in Alpine v. Cowles further states:

“...the fair reporting privilege extends to reports of official actions, including actions arising from judicial proceedings. RESTATEMENT, *supra*, § 611. Here, the challenged statements are easily traceable to the district court's proceedings as reflected by Microsoft's complaint, the court order signed by Mr. Le and reported in the story, and the district court's memorandum decision.

Alpine v. Cowles, 114 Wn. App. 371, 385, 57 P.3d 1178 (2002)

In this instance, since Mr. Brecht had only filed the complaint the day prior to the radio show (CP 308-309), there were not any proceedings at that point, and certainly no signed court orders, memorandums or anything else indicative of an official court action. The court here affirming that there is no basis for the Fair Report Privilege in the instance of the Brecht v. Fisher litigation.

The Court of Appeals in Alpine v. Cowles further states:

“A publisher fairly abridges the judicial proceeding if the report renders a “substantially correct” account of the proceeding.” *Ditton*, 947 F. Supp. at 230 (quoting *Rushford*, 846 F.2d at 254-55). Under this standard, the publisher must not edit and delete an otherwise accurate report so as to misrepresent the proceeding and thus mislead the reader. RESTATEMENT, *supra*, § 611 cmt. F.

Alpine v. Cowles, 114 Wn. App. 371, 386, 57 P.3d 1178 (2002)

Quoting from RESTATEMENT OF TORTS 2nd, § 611 cmt F:

“...Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report

of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article. The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

1. The RESTATEMENT OF TORTS 2nd, § 611 comment F requires that no editing or deleting be done as to misrepresent the proceeding and thus convey an erroneous impression to those who hear or read it. The example they cite for this is, “the failure to publish the exculpatory evidence.”

Mr. Carlson and Mr. Schram failed to broadcast any exculpatory evidence about the Brecht v. Hague litigation. (CP 237-273) The complaint had only been filed the day before the show and therefore had not even been answered by the opposing parties. Therefore the only thing to report from the claimed ‘judicial proceeding’ was from the plaintiff’s complaint. Of all the pages in the complaint, the only one Mr. Carlson and Mr. Schram chose to read was the exhibit of the Hague campaign mailer with the defamatory language! They disregarded every other page in the complaint that was all exculpatory information!

Again, they read only the text on the Hague campaign mailer and they did not cite any of the exculpatory evidence contained in the complaint. Mr. Carlson and Mr. Schram did not even report the exculpatory information that was included about the complaint in the October 30, 2007 Seattle Post-Intelligencer article (CP 308-309), that they claimed in their sworn declaration they read the morning before the radio show began: (CP 289, 297)

“The Hague mailing attributed the information to "Washington Courts Case Record Search." Brecht's complaint said he "has never been convicted of assault, and no 'Washington Courts Case Record Search' would reveal an assault conviction since no conviction ever happened." The complaint said, "Plaintiff is also not on the top of any 'law enforcement list' of any sort for any reason." It seeks unspecified monetary damages. Brecht, a Bellevue electrician, said in an interview Monday that he was arrested on suspicion of domestic violence on a complaint by his then-wife in 2001. He said the case was dismissed and he was never convicted of assault. However, he said that after he met with his then-wife at her request, he was fined for violating a no-contact order that she had obtained.”

October 30, 2007 Seattle Post-Intelligencer article (CP 308-309)

2. RESTATEMENT OF TORTS 2nd, § 611 comment F also states that the reporter is not privileged under this Section to make additions that convey a defamatory impression:

The entire interchange between Mr. Carlson, Mr. Schram and both callers Mark and Chris is one of agreement and oneness of defamation against Mr. Brecht as evidenced by their interchange on the radio show. (CP 257-260, CP 264-265)

3. RESTATEMENT OF TORTS 2nd, § 611 comment F also states that the reporter is not privileged under this Section to make additions that impute corrupt motives:

Here, Mr. Schram continually questions Mr. Pope about why Mr. Brecht did not hire another attorney: (CP 251)

MR. SCHRAM: But why are you representing him?

MR. SCHRAM: Well, couldn't he have hired another lawyer?

MR. SCHRAM: But that's still -- it doesn't answer my question, Richard. Why did you elect to represent him in a lawsuit -- a libel lawsuit against your political opponent?

MR. SCHRAM: So you're saying another lawyer wouldn't have done that?

These series of questions by Mr. Schram are an implication that Mr. Brecht and Mr. Pope filed the case for corrupt motives. By repeatedly asking, “why are you representing him?”, Mr. Schram is imputing a corrupt motive by implying the only reason Mr. Brecht filed the lawsuit was to get back at Ms. Hague. Since there was this tit-for-tat between the Pope campaign and the Hague campaign, as evidenced in the Seattle P-I article (CP 308-309), the implication was the filing of the case was just one more thing to throw at the Hague Campaign before the election and that the case had no merit on its own. The first caller Mark stated that Mr. Brecht’s filing of the Hague defamation lawsuit was frivolous (CP 257). Mr. Bader also implied in Seattle Post-Intelligencer article (CP 308-309) that the filing of the Hague defamation lawsuit was frivolous. This is yet more evidence of a pattern of behavior between the Hague campaign and the Fisher Defendants. The fact that Mr. Carlson and Mr. Schram agreed with the callers’ defamatory statements is further evidence of this.

RESTATEMENT OF TORTS 2nd, § 611 comment F also states that the reporter is not privileged under this Section to make additions that indict expressly or by innuendo the veracity or integrity of any of the parties.

Mr. Carlson and Mr. Schram agreed with the defamatory statements made by the callers, which is clearly an indictment of the integrity of Mr. Brecht. (CP 257-260, 264-265)

Mr. Carlson and Mr. Schram both share in making statements about Mr. Brecht’s name change. The innuendo here is that only

somebody who is nefarious or has something to hide changes his name and, that since he changed his name, he must be the notorious wife beater with multiple convictions for assault that we claim he is. The information of Mr. Brecht's name change was not contained in the Brecht v. Hague complaint and had nothing to do with Mr. Carlson's and Mr. Schram's purpose for their privilege: their claim that the defamatory campaign mailer was read, "solely for the purpose of questioning Richard Pope's involvement with the Hague case." (CP 430)

MR. SCHRAM: Well, his name used to be something different than what it is now.

MR. CARLSON: Right.

MR. SCHRAM: Is it -- under which name? Under any name, or just the one that he currently has?

MR. SCHRAM: But were there not other court appearances under his former name?

It has been shown here with sufficient probative evidence that Mr. Carlson and Mr. Schram do not have a privilege as per the standards set forth by the fair reporting act, RESTATEMENT OF TORTS 2nd, § 611.

1.3 The Abuse Of A Qualified Privilege

Mr. Carlson and Mr. Schram fail to meet any privilege for any other conditional privileges that may apply as set forth in Alpine v. Cowles and Moe v. Wise.

In Alpine v. Cowles, the Washington Court of Appeals states:

“... But an otherwise applicable conditional privilege will offer no protection if the publisher's conduct abuses the privilege.

Alpine v. Cowles, 114 Wn. App. 371, 382, 57 P.3d 1178 (2002)

The Washington Court of Appeals Alpine v. Cowles directs us to Moe v. Wise to determine if a conditional privilege has been abused:

A. Reckless Disregard

To prove reckless disregard, the plaintiff must show with clear and convincing evidence that the defendant in fact entertained serious doubts as to the truth of the publication. *Id.* (citing St. Amant v. Thompson, 390 U.S. 727, 730-31, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)

Moe v. Wise, 97 Wn. App. 950, 965, 989 P.2d 1148 (1999)

In this instance, the evidence of actual malice by all the defendants has been evidenced in Section 2.1 beginning on page 30 of this brief: “List Of Cumulative Evidence Of Actual Malice” and should be applied by the court here to satisfy the Plaintiff’s burden that the conditional privilege with regards to RESTATEMENT OF TORTS 2nd, § 600 has been abused.

B. Acting to Protect Interest Underlying Privilege

“To show that Robbins did not act for the purpose of protecting the interest underlying and supporting the privilege, RESTATEMENT, *supra*, § 603.”

Moe v. Wise, 97 Wn. App. 950, 966, 989 P.2d 1148 (1999)

In this instance, the purpose for the privilege was as Mr. Carlson and Mr. Schram state: “solely for the purpose of questioning Richard Pope's involvement with the Hague case.” (CP 430) Both Mr. Carlson and Mr. Schram did not act for the purpose of protecting this privilege because they had an ulterior purpose of making it believable to the listeners that

Mr. Brecht was a notorious wife beater with multiple assault convictions and that Mr. Brecht and Mr. Pope were corrupt in their reasons for filing the Brecht v. Hague lawsuit. This is evidenced again by the implication of corruption from Mr. Schram's questioning of the reasons for Mr. Pope's representation of Mr. Brecht (CP 251) and the defamatory interchange between Mr. Carlson, Mr. Schram and the callers where they all agree as one that Mr. Brecht is a convicted wife beater. Both of these areas are well without the scope that the privilege is intended for. (CP 430)

D. Objective of Privilege (Necessity For Publication And Purpose Of Privilege)

“Here, Moe needed to produce sufficient evidence showing that Robbins did not reasonably believe the letter was necessary to accomplish the purpose of the privilege... RESTATEMENT, *supra*, § 605”

Moe v. Wise, 97 Wn. App. 950, 967, 989 P.2d 1148 (1999)

As set forth in section 2.1 beginning on page 30 of this brief “List Of Cumulative Evidence Of Actual Malice”, Mr. Brecht lists numerous instances of Actual Malice and asks the Court to apply this evidence Actual Malice here. The “List Of Cumulative Evidence Of Actual Malice”, evidences Mr. Carlson's and Mr. Schram's reckless disregard for the truth in their defamatory comments against Mr. Brecht. Because of this reckless disregard, they did not reasonably believe they needed to defame Mr. Brecht to report, “solely for the purpose of questioning Richard Pope's involvement with the Hague case.” Again, this was their stated purpose for privilege. (CP 430)

Inaccurate And Defamatory Reports Of Facts Drawn From Judicial Proceedings Are Not Deserving Of First Amendment Protection

In Mark v. King Broadcasting, the court stated:

The Supreme Court has held that "inaccurate and defamatory reports of facts" drawn from judicial proceedings are not deserving of First Amendment protection. Time, Inc. v. Firestone, 424 U.S. 448, 457, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976).

Mark v. King Broadcasting, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981)

In Time, Inc. v. Firestone, the United States Supreme Court stated:

“For petitioner's report to have been accurate, the divorce granted Russell Firestone must have been based on a finding by the divorce court that his wife had committed extreme cruelty toward him and that she had been guilty of adultery...

...Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case.”

Time, Inc. v. Firestone, 424 U.S. 448, 457, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976)

Fisher Defendants Are Liable For Defamation Under State Statutes

Washington statutory law governing the liability of broadcasters for defamation fits squarely here:

RCW 19.64.010

Liability of owner or operator limited.

“Where the owner, licensee, or operator of a radio or television broadcasting station, or the agents or employees thereof, has required a person speaking over said station to submit a written copy of his script prior to such broadcast and has cut such speaker off the air as soon as reasonably possible in the event such speaker deviates from such written script, said owner, licensee, or operator, or the agents or employees thereof, shall not be liable for any damages, for any defamatory statement published or uttered by such person in or as a part of such radio or

television broadcast unless such defamatory statements are contained in said written script.”

RCW 19.64.010 states that there are limited protections for broadcasting station ownership and employees thereof, only in the context of when a script is provided. There are no protections allowed in any other instance, including when there are no scripts used as in the defamatory radio show in this case. Therefore the Fisher Defendants must be liable for the callers’ statements. They allowed the callers to continue to defame the Mr. Brecht and did not cut them off. Allowing the first utterance of defamation from the first caller may be considered a mistake, **however allowing multiple utterances of defamatory comments from multiple callers and then agreeing with each of those callers is clearly evidence of actual malice**. Even if the Fisher Defendants were not responsible for the callers’ defamatory statements, they still verbally affirmed agreement with those defamatory statements which is equal to them adopting those defamatory statements as their own.

Further, RCW 19.64.020 indeed affirms that there are no further liability limits imposed:

RCW 19.64.020

Speaker or sponsor liability not limited.

“Nothing contained shall be construed as limiting the liability of any speaker or his sponsor or sponsors for defamatory statements made by such speaker in or as a part of any such broadcast.”

2. The Fisher Defendants Acted With Actual Malice Towards Mr. Brecht With Clear And Convincing Clarity.

The trial court stated in its ruling:

“So, clearly, to me, with regard to what the caller was saying, there is no actual malice even upon a facia case, even circumstantially. So, those comments do not rise to the level to allow the case to go forward...so, the statements may still have been way over the top, but they were not made with actual malice.” (RP 41-42)

How To Prove Actual Malice With Clear And Convincing Clarity:

The actions by the defendants constitute actual malice. The definition actual malice adhered to by Washington State is: “knowledge of falsity or reckless disregard for the truth.” Along with the actual malice standard, there is a companion requirement that it be proved with clear and convincing clarity. Only the element of fault - proof of actual malice – must be proven by clear and convincing evidence. Other statements can be established by a preponderance of the evidence. Richmond v. Thompson, 130 Wn.2d 368, 922 P.2d 1343 (1996).

The Washington State Supreme Court in Herron v. King states that evidence must be viewed cumulatively. When viewed in its entirety, the “The Commentators” broadcast paints a picture of a Broadcaster that produced a show where not only once but on numerous instances the Fisher Defendants defamed Mr. Brecht. It paints the picture when looked at as a whole with the other objective evidence allowing a jury to reasonably conclude the Fisher Defendants indeed were aware of their

probable falsity. Recalling the guidance from the Washington Supreme Court in Herron v. King:

“While no single factor establishes actual malice, several factors are probative evidence of actual malice. A reasonable jury could find that these factors taken together show actual malice with convincing clarity.”

Herron v King Broadcasting, 109 Wn.2d 514, 527, 746 P.2d 295 (1987)

“Although actual malice is subjective, a "court typically will infer actual malice from objective facts." Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 196 (1st Cir. 1982) ("whether [defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts."), *aff'd*, 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984); Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921, 927 (2d Cir. 1987) ("Malice may be proved inferentially because it is a matter of the defendant's subjective mental state, revolves around facts usually within the defendant's knowledge and control, and rarely is admitted."). These facts should provide evidence of "negligence, motive and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." Bose Corp., 692 F.2d at 196 (emphasis added); see Goldwater, 414 F.2d at 342 ("There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.")

Celle v. Filipino Reporter Enterprises, 209 F.3d 163,183 (2nd Cir. 2000)

“The clear, cogent and convincing burden of proof contains two elements: 1) the amount of evidence necessary to submit the question to the trier of fact or the burden of production, which is met by substantial evidence; and 2) the burden of persuasion. As to the burden of persuasion, the trier of fact, not the appellate court, must be persuaded that the fact in issue is highly probable.”

Endicott v. Saul, 142 Wn. App. 899, 909-10, 176 P.3d 560, 567 (2008).

2.1 List Of Cumulative Evidence Of Actual Malice

1. Indications That The Publisher Has A Preconceived Plan “To Get” The Plaintiff And Purposeful Avoidance Of The Truth. (*Citing Sack on Defamation* 5.5.2 at note 414 Rel. #10 4/09)

In the case of Scientology v. Time Warner, the federal court stated:

“...The combination of inadequate investigation with bias on the part of the publisher can give rise to an inference of actual malice. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 682, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989). With a showing of an extreme departure from standard investigative techniques, bias of the reporter becomes relevant to explain this extreme departure as more than mere carelessness -- rather as purposeful avoidance of the truth.”

Scientology v. Time Warner, Inc., 903 F. Supp. 637, 641 (S.D.N.Y. 1995)

Definition of bias – Preference or inclination that inhibits impartial judgment; prejudice.

The American Heritage Dictionary New College Edition

"A review of the entire record of the instant case disclosed substantial probative evidence from which a jury could have concluded that the Journal was singularly biased in favor of Dolan and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the Journal Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolan from the Journal as compared with the equally consistently unfavorable news coverage afforded Connaughton;

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 688, 691, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance there is ample evidence of bias on the part of the Defendants. As previously evidenced in the statement of facts, Mr. Carlson had an extremely close relationship with Mr. Bader since 1980 that was based upon friendship, mutual interests and business. The Fisher Defendants' message during the radio show when taken as a whole, accomplishes the same end as Mr. Bader's defamatory mailer form the

Hague campaign: that Mr. Brecht was a 'notorious wife beater with multiple assault convictions' (CP 305-306). This is circumstantial evidence of Mr. Carlson's behavior showing his motive to defame Mr. Brecht and is evidence of reckless disregard for the truth.

Furthermore, Mr. Carlson and Mr. Schram claim they were reporting on the Brecht v. Hague case and that their report was privileged. (CP 430) However their extreme bias is abjectly manifest here in that the only information they reported on from the case was read from the defamatory campaign mailer! (CP 305-306) They broadcast absolutely no exculpatory language from Mr. Brecht's lawsuit complaint, which is abuse of privilege and further evidence of actual malice on their part.

Mr. Carlson and Mr. Schram stated the rebroadcasting of the defamatory mailer was read "solely for the purpose of questioning Richard Pope's involvement with the Hague case." (CP 430) Then why on earth would they have gone through all the work they did to impugn and denigrate Mr. Brecht's reputation throughout the bulk of the radio show? This is blatant Actual Malice. (CP 237-273)

"These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice."

Bose Corp. v. Consumers Union, 692 F.2d 189, 196 (1st Cir. 1982)

Conversely, Mr. Carlson had previous run-ins with Mr. Pope (CP 257-258) and although he testified that he bore no ill will towards Mr.

Pope (CP 289-291), the actions of all the Fisher Defendants - through their statements on the radio show – and when taken on a whole – reveal a bias against Mr. Pope and Mr. Brecht collectively. (CP 237-273)

“Actual malice can be established "through the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence[.]”

Liberty Lobby, Inc. v. Dow Jones & Co., 267 U.S. App. D.C. 337, 838 F.2d 1287, 1293 (D.C. Cir. 1988)

Viewing the evidence in the record in a light most favorable to Brecht, with regards to the Fisher Defendants’ extreme departure from standard investigatory techniques: Mr. Carlson stated he had received the defamatory Hague campaign mailer in the mail. (CP 248) The mailer contained defamatory statements about Mr. Brecht that were underscored with “Washington Courts Record Search” implying that these allegations could be verified by performing a Washington Courts record search. Through this notice, Mr. Carlson knew that he could determine the truth or falsity of these defamatory allegations as well as insure a basis for his defamatory statements on the radio show by performing a court record search. With the knowledge of the lawsuit against Hague in the morning’s Seattle Post-Intelligencer, they were under notice that the allegations in the mailer were contested. (CP 308-309) Yet they both make identical statements in their declarations that they were basically ignorant of any details concerning the defamatory allegations made against Mr. Brecht.

They claim they had, “no independent knowledge of the facts at issue in the litigation which became Brecht v. Hague.” (CP 289, 297)

“While I was vaguely and generally aware that Brecht had sued Hague for defamation, based upon a quick review of the story in the Seattle Post Intelligencer that morning, I really had no independent knowledge of the facts at issue in the litigation which became Brecht v. Hague, King County Cause No. 07-2-34389-0 SEA (“Hague case”). All that I knew from the newspaper story was the latest development in the Pope campaign.” (CP 289, 297)

Mr. Carlson and Mr. Bader claim to be ignorant of the details of Mr. Brecht’s record. Yet the evidence as follows abounds with evidence of Mr. Bader’s hostility towards Mr. Brecht. The Washington State Supreme Court in Herron v. King states that whether a defamer investigates or is ignorant of the facts, both are evidence of actual malice:

“Whether McGaffin knew that his sources were hostile to the Plaintiff or ignorant of critical details was probative evidence of actual malice. Tavoulareas v. Piro, at 132.”

Herron v. King Broadcasting, 109 Wn.2d 514, 526, 746 P.2d 295 (1987)

The fact that whether the published defamation was a result of investigative work or whether the Fisher Defendants were ignorant of critical details, as they claim in this case: they are both instances of probative evidence for actual malice.

However, contrary to their sworn declarations, both Mr. Carlson and Mr. Schram evidence their knowledge of Mr. Brecht’s name change: (CP 252-253)

MR. SCHRAM: Well, his name used to be something different than what it is now.

Mr. CARLSON: Right

MR. SCHRAM: Is it – under which name? Under any name, or just the one that he currently has?

MR. SCHRAM: But were there not other court appearances under his former name?

The information about Mr. Brecht's name change was available on a Washington Court record search and these statements by Mr. Carlson and Mr. Bader evidence that they were not ignorant of the details as they implied (CP 289, 297) and were aware of court records pertaining to Mr. Brecht prior to their radio show.

Furthermore, in their Motion for Summary Judgment, the Fisher Defendants cite Mr. Brecht's 2001 dissolution case records as the basis for their use of the defamatory "wife beating" statements they made. (CP 196-197) These are now two instances of evidence they investigated Mr. Brecht's court records. This flies in the face of their sworn declarations that they did not investigate. (CP 289, 297) Yet despite their investigation, the radio show transcript is conspicuously absent of the dissolution court's final judgment that Mr. Brecht was not found guilty of any wrong doing and he was not convicted of being a wife beater as the Fisher Defendants claimed. (CP 257-259, 264-265) The radio show transcript is further devoid of any exculpatory evidence from numerous witness declarations contained in the same dissolution records they cite. For the Fisher Defendants to "cherry pick" information from the dissolution records supporting their position while disregarding the court's judgment and

exculpatory evidence is evidence of their purposeful avoidance of the truth which is reckless disregard of the truth as cited above by the U.S. Supreme Court in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 682, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989).

Furthermore, as stated by the U.S. Supreme Court in Time v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976) and confirmed in Mark v. King Broadcasting, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981), "The Supreme Court has held that "inaccurate and defamatory reports of facts" drawn from judicial proceedings are not deserving of First Amendment protection."

The evidence explained here of the Fisher Defendants' "extreme departure from standard investigative techniques support a preconceived plan "to get" Mr. Brecht. This is sufficient probative evidence of an inadequate investigation with bias on their part which gives rise to an inference of actual malice. Scientology v. Time Warner, Inc., 903 F. Supp. 637, 641 (S.D.N.Y 1995).

The Fisher Defendants claimed in their Motion for Summary Judgment that there was no way Mr. Carlson and Mr. Schram could have actual malice because they did not know Mr. Brecht or any of the two callers or what they would say. (CP 191-192) Who they knew is not of legal significance. As evidenced in this section on Actual Malice, reckless disregard of the truth can be shown through many different factors:

“However, each of the above factors may be taken into account cumulatively as probative evidence of actual malice. St. Amant, at 732.

Herron v. Tribune Publishing, 108 Wn.2d 162, 172, 736 P.2d 249 (1987)

2. Reliance On Questionable Sources: (Citing Sack on Defamation 5.5.2 at note 411 Rel. #10 4/09)

In the case of Pep v. Newsweek, the federal court stated:

“The cases cited by Newsweek for the proposition that failure to investigate a story does not necessarily constitute actual malice are also inapposite. On a motion for summary judgment, the question is not whether mere failure to investigate a story can, standing alone, constitute malice. Rather, the issue is: What did Newsweek (Bonventre) actually believe? Did he have serious doubts about the accuracy of the story? Facts such as failure to investigate, or reliance on a questionable source are relevant to that determination: they may tend to show that a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his source.”

Pep v. Newsweek, 553 F. Supp. 1000, 1003 (S.D.N.Y. 1983)

The Fisher Defendants relied on a questionable source for their allegations that Mr. Brecht was a wife beater. It has already been evidenced of the bias Mr. Carlson had for Mr. Bader and both Mr. Carlson’s and Mr. Schram’s admitted failure to investigate. (CP 289, 297) Viewing the evidence in the record in a light most favorable to Brecht, in this instance, A) Mr. Bader was the original source for the allegations that Mr. Brecht was convicted of assault. (CP 286, 291, 308-309) and (CP 305-306) B) Mr. Bader was the campaign manager for the Hague campaign which was opposing Mr. Pope in a vicious campaign. (CP 308-309) C) The Fisher Defendants in this case were under notice from the Seattle Post-Intelligencer article of a lawsuit brought by Mr. Brecht, where Mr. Bader was a named defendant. (CP 308-309) and D) The Seattle Post-

Intelligencer article stated that the lawsuit was for false and defamatory allegations against Mr. Brecht. (CP 308-309) All of these facts should have indicated to the defendants that Mr. Bader was indeed a questionable source. Yet the defendants didn't question. They decided to rebroadcast the Hague campaign's defamatory mailer (CP 252), and agreed with all of the callers that Mr. Brecht was a 'notorious wife beater with multiple assault convictions.' (CP 257-259, 264-265) Coupled with the failure to investigate as previously evidenced in Mr. Carlson's and Mr. Schram's sworn declarations (CP 289, 297) and their reliance on this questionable source Mr. Bader, there is sufficient probative evidence for a jury to conclude that the defendants acted with reckless disregard by either not caring whether their defamatory allegations against Mr. Brecht were truthful or not, or that they did not want to discover the facts which would have contradicted their source. Pep v. Newsweek, 553 F. Supp. at 1003. The U.S. Supreme Court in St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968) affirmed that recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. Because of the notice of the lawsuit and denials as printed in the Seattle P-I on October 30, 2007 (CP 308-309), surely the Fisher Defendants had reason to doubt both Mr. Bader's veracity or truthfulness and to doubt the accuracy of his reports:

"Professions of good faith [by the defendant] will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless

man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *St. Amant*, at 732.

Herron v. King Broadcasting, 109 Wn.2d 514, 524, 746 P.2d 295 (1987).

3. Publication In The Face Of Verifiable Denials Or Without Further Investigation Despite The Seriousness Of The Allegations: (Citing Sack on Defamation 5.5.2 at note 416 Rel. #10 4/09)

In the case of Curran v. Philadelphia Newspapers, the court stated:

The term "reckless disregard" is not amenable to one infallible definition. It is a term which is understood by considering a variety of factors in the context of an actual case. Such factors may be whether the author published a statement in the face of verifiable denials, *Brown & Williamson Tobacco Corporation v. Jacobson*, 827 F.2d 1119 (7th Cir.1987), cert. denied __U.S. __, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988), and without further investigation or corroboration, where allegations were clearly serious enough to warrant some attempt at substantiation. *Stickney v. Chester County Communications, Ltd.*, 361 Pa.Super. 166, 522 A.2d 66 (1987).

Curran v. Philadelphia Newspapers, 376 Pa. Super. 508, 514, 546 A.2d 639, 642 (1988)

Viewing the evidence in the record in a light most favorable to Brecht, in this instance, as already evidenced above, there were verifiable denials: Mr. Carlson and Mr. Schram were on notice from the Seattle Post-Intelligencer article they read the morning of the show that A) Mr. Brecht denied the defamatory allegations, (CP 308-309) that B) there was a lawsuit to that effect (CP 308-309) and C) the information for which to verify the truth or falsity of the reports was available in a Washington Court Record Search. (CP 308-309) The allegations were serious enough to warrant some attempt at substantiation because Mr. Brecht had been accused of being a 'notorious wife beater with multiple assault convictions.' This accusation was designed to be as inflammatory as

possible. There is nothing more loathsome in society than a wife beater. Compounded with the attribution of being on ‘top of law enforcement lists’ with multiple ‘assault convictions’ added an evil component – one that arises to the level of moral turpitude. Mr. Carlson’s and Mr. Schram’s own admissions are that they did not investigate and that they did not seek to corroborate any of the allegations against Mr. Brecht despite their severity (CP 289, 297) This is sufficient probative evidence for a jury to conclude that the defendants acted with reckless disregard for the truth.

4. Warning That The Statement Is Not True Thus Creating Serious Doubts As To The Truth Or Falsity Requiring Further Investigation.

In the case of O’Brien v. Tribune Publishing, the Court stated:

“As stated in St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968), the determination of what is a reckless disregard for the truth or falsity of a statement is governed by the necessity to prove by clear and convincing evidence that defendants entertained serious doubts as to the truth or falsity of the defamatory publication. A clear warning from O’Brien that the statement was not true would have furnished an objective manifestation which would logically create serious doubts as to the truth or falsity of the statement. This would have required Franich to investigate the facts more carefully.” See Miller v. Argus Publishing Co., 79 Wn.2d 816, 490 P.2d 101 (1971).

O’Brien v. Tribune Publishing, 7 Wn. App. 107, 125, 499 P.2d 24 (1972)

Viewing the evidence in the record in a light most favorable to Brecht, in this instance, Mr. Carlson and Mr. Schram had ample notice prior to the radio show that the defamatory allegations against Mr. Brecht were not true and that they should have investigated the facts more carefully. This is evidenced by the Seattle Post-Intelligencer article (CP

308-309) which they said they read the morning before the show. (CP 289, 297) The Seattle Post-Intelligencer article stated:

“Brecht's complaint said he "has never been convicted of assault, and no 'Washington Courts Case Record Search' would reveal an assault conviction since no conviction ever happened.”

Seattle Post-Intelligencer, October 30, 2007 (CP 308-309)

This is sufficient probative evidence for a jury to conclude that the Fisher Defendants acted with reckless disregard for the truth.

5. Failure To Seek Corroboration From The Most Obvious Source.
(Citing Sack on Defamation 5.5.2 at note 409 Rel. #10 4/09)

In the case of Harte-Hanks v. Connaughton, the Court stated:

“Although failure to investigate will not alone support a finding of actual malice, *see St. Amant*, 390 U.S., at 731, 733, the purposeful avoidance of the truth is in a different category.”

“There is a remarkable similarity between this case -- and in particular, the newspaper's failure to interview Stephens and failure to listen to the tape recording of the September 17 interview at Connaughton's home -- and the facts that supported the Court's judgment in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In Butts the evidence showed that the Saturday Evening Post had published an accurate account of an unreliable informant's false description of the Georgia athletic director's purported agreement to "fix" a college football game. Although there was reason to question the informant's veracity, just as there was reason to doubt Thompson's story, the editors did not interview a witness who had the same access to the facts as the informant and did not look at films that revealed what actually happened at the game in question. This evidence of an intent to avoid the truth was not only sufficient to convince the plurality that there had been an extreme departure from professional publishing standards, but it was also sufficient to satisfy the more demanding New York Times standard applied by Chief Justice Warren, Justice Brennan, and Justice White.”

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 688, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, similarly as the Connoughton Court found, there is also a remarkable similarity between this case and the Mr. Carlson's and Mr. Schram's failure to interview Mr. Brecht's wife or Mr. Brecht. (CP 289, 297) Mr. Carlson's and Mr. Schram's failure to investigate the dissolution proceeding record (CP 289, 297), which was easily accessible and plainly alluded to in the defamatory mailer that attributed the defamatory allegations to a "Washington Court Record Search." (CP 305-306) The evidence shows by republishing the defamatory mailer and agreeing with the callers' defamatory statements (CP 257-259, 264-265) the Fisher Defendants had published a defamatory account of an unreliable informant's false description of Mr. Brecht's court record. (CP 305-306) Although there was reason to question the Mr. Bader's veracity, just as there was reason to doubt the Fisher radio show's story, the Fisher Defendants did not interview witnesses who had the same access to the facts as the informant Mr. Bader (i.e. Mr. Brecht and his ex-wife) and did not look at the dissolution court record that revealed what actually happened. (CP 324-326) This is sufficient probative evidence for a jury to conclude that the Fisher Defendants acted with a purposeful avoidance of the truth which is evidence of reckless disregard for the truth.

6. Indications That The Publisher Was Hostile. (Citing Sack on Defamation 5.5.2 at note 415 Rel. #10 4/09)

In the case of Arroyo v. Rosen, the Court stated:

"Because a "plaintiff will 'rarely be successful in proving awareness of falsehood from the mouth of the defendant himself,'" Batson v. Shiflett,

325 Md. at 730, (*quoting* Herbert v. Lando, 441 U.S. 153, 170, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979)), plaintiffs must normally rely on circumstantial evidence, including evidence of motive and intent. Ill will, hatred, and the desire to injure thus have probative value although they alone "are insufficient to establish actual malice." Batson, 325 Md. at 730.

Arroyo v. Rosen, 102 Md. App. 101, 113, 648 A.2d 1074 (1994)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, when considered as a whole, the Fisher Defendants had a motive to harm Mr. Brecht: to falsely vilify him as a 'notorious wife beater with multiple assault convictions.' The more they could do that, the more damage they could inflict on Mr. Pope and his chances to win the election. This was the motive for the Hague campaign as contained in their defamatory mailer (CP 305-306) and this was the motive for the way the defendants structured the radio show. (CP 237-273) Because of the Fisher Defendants' numerous statements associating Mr. Brecht to Mr. Pope, any hostility shown to Mr. Brecht was automatically transferred to Mr. Pope and visa versa. This is further evidence of a pattern of behavior that ran from the Hague campaign through the Fisher radio show:

MR. CARLSON: All right. Here, basically is what your opponent is saying about you. You're a nut. You're unstable. Uh, you don't like women. You're volatile. You're unqualified. What do you say to that? (CP 248)

MR. SCHRAM: So now who's this guy that you're representing that's now suing Jane Hague for libel? (CP 250)

MR. CARLSON: Yeah, I have it in front me here. The gentleman's name is Paul Brecht. (CP 251)

MR. SCHRAM: Well, his name used to be something different than what it is now. (CP 252)

MR. CARLSON: Right. And he is on your flyer as endorsing you. (CP 252)

MR. SCHRAM: Is it -- under which name? Under any name, or just the one that he currently has? (CP 252)

MR. SCHRAM: But were there not other court appearances under his former name? (CP 252-253)

MR. SCHRAM: I think Richard's wacko. I do. (CP 256)

MARK: ...I think that this is an odd individual in Richard Pope. And the fact that he chose, as his primary endorser, a man who had been convicted of domestic violence is just bizarre to me. (CP 257)

MARK: ...But the stuff that Richard has done in defending men who beat their wives, he's finally being held accountable. (CP 258)

MARK: Mr. Brecht was convicted of domestic violence, Mr. Pope, and you know that's the truth because you were his lawyer, like you are for a lot of men who -- (CP 258)

MARK: -- rough up their wives. (CP2 59)

MARK: And you've defended wife beaters for the last sixteen years, Richard. (CP 259)

MARK: And he's your main endorser, and the guy has a domestic violence conviction and he's vouching in that mail piece for your integrity. (CP 260)

CHRIS: So not only is Richard running around with this guy, he's got him working on his campaign, and he's pretty much a woman beater. (CP 264-265)

CHRIS: But the guy is not exactly upstanding. And it's just -- it's so illustrative of Richard's whole career that -- look at the people he runs with, what does he accomplish? Pretty much nothing. (CP 265)

This is sufficient probative evidence for a jury to conclude that the defendants acted with hostility and intent to injure which is evidence of reckless disregard for the truth.

7. Unexplained Distortion Or The Absence Of Any Factual Basis To Support The Statement. (*Citing Sack on Defamation 5.5.2 at note 417 Rel. #10 4/09*)

In the case of Curran v. Philadelphia Newspapers, the Court stated:

“Likewise, evidence of unexplained distortion or the absence of any factual basis to support an accusation may be considered in determining whether the record is sufficient to support a finding of "actual malice". *Id.* See also Frisk v. News Company, 361 Pa. Super. 536, 523 A.2d 347 (1986) (clear departures from acceptable journalistic procedures, including the lack of adequate prepublication investigation; the use of wholly speculative accusations and accusatory inferences; and the failure to utilize or employ effective editorial review, were sufficient to support finding of reckless disregard for the falsity of the information). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 158, 87 S.Ct. 1975, 1993, 18 L.Ed.2d 1094 (1967). Robert E.J.

Curran v. Philadelphia Newspapers, 376 Pa. Super. 508, 514; 546 A.2d 639, 642 (1988)

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, the first caller “Mark” made several statements that juxtaposed a series of facts so as to imply a defamatory connection between them and created a defamatory implication by omitting facts. This unexplained distortion left a false impression that Mr. Brecht was a convicted wife beater: Mohr v. Grant, 153 Wn.2d at 812 (CP 257-259)

MARK: ...And the fact that he chose, as his primary endorser, a man who had been convicted of domestic violence is just bizarre to me.

MARK:...But the stuff that Richard has done in defending men who beat their wives, he’s finally being held accountable. And I think that’s a good thing.

MARK:...Mr. Brecht was convicted of domestic violence, Mr. Pope, and you know that’s the truth because you were his lawyer, like you are for a lot of men who --

MARK: -- rough up their wives.

MARK: He was convicted of domestic violence. Is that true or untrue?

MARK: He was convicted of a domestic violence offense.

MARK: And you’ve defended wife beaters for the last sixteen years, Richard.

MARK: And he's your main endorser, and the guy has a domestic violence conviction and he's vouching in that mail piece for your integrity.

MARK: He's the only person you can find to vouch for your integrity and he has a domestic violence conviction

Considered as a whole, these unexplained distortions, or the absence of any factual basis to support an accusation, leave an unmistakable impression in the mind of the audience that Mr. Brecht was convicted of physical violence toward his former wife. Although there is a domestic violence statute which contains several laws therein, there is no specific law titled 'domestic violence'. Therefore it is impossible that Mr. Brecht was convicted of 'domestic violence'. This was used by "Mark" to imply that Mr. Brecht was convicted of violence towards his former wife. Juxtaposing the statements of "convicted of domestic violence" with the statements of, "men who beat their wives" and "men who rough up their wives" and "wife beaters," the inference is unmistakably clear: that Mr. Brecht is a convicted wife beater.

At no time did any of the Fisher Defendants include any language that would correct the false impressions caused by of their statements. Their omission of key facts helped perfect their defamation by implication. The key facts being that 1) Mr. Brecht was only convicted of violating a no contact order with no allegations of physical violence (CP 347) and that 2) no court ever found Mr. Brecht guilty of any violence towards his then wife. (CP 324-326)

The second caller “Chris” does remarkably the same thing by juxtaposing “he’s pretty much a woman beater” with some discussion of Mr. Brecht’s conviction. This shows yet one more time a similar pattern of conduct among the defendants in this case and that of Mr. Bader and the Hague campaign: (CP 264-265)

CHRIS: and he’s pretty much a woman beater.

CHRIS: Now we can debate the finer points of actually his conviction, or you know, it got punted in the legal system.

Again, Mr. Carlson and Mr. Schram are on record with agreeing with each of the callers defamatory statements: (CP 257-259, 264-265) “Yes”, “All Right”, “All Right”, “Right” and “All Right.”

Not only do they convey their agreement with the callers statements, they signal to the listeners that they were together with them in attacking Mr. Brecht and Mr. Pope by twice using language of “let’s give Mr. Pope a chance” implying that they not only agree with the callers but cite an even closer affinity with them against Mr. Brecht: (CP 257-259, 264-265).

As the court affirmed above in the Curran v. Philadelphia Newspapers case, there is a complete absence of any factual basis to support these accusatory inferences of defamation against Mr. Brecht. This is sufficient probative evidence to support a finding of reckless disregard for the falsity of the information and for a jury to conclude that the defendants acted with reckless disregard for the truth.

8. Intentional Misstatement Of A Charge To Make It Seem More Convincing Or Condemnatory Than It Is. (Citing Sack on Defamation 5.5.2 at note 422 Rel. #10 4/09)

In the case of Westmoreland v. CBS, the Court stated:

“Although a reporter may have sufficient evidence of his charge to foreclose any material issue of constitutional malice for its publication, he may nonetheless make himself liable if he knowingly or recklessly misstates that evidence to make it seem more convincing or condemnatory than it is. If, for example, a publication asserts falsely and without basis that the charge was confirmed by an eyewitness, if in the editing process it distorts statements of witnesses so that they seem to say more than in fact was said, or if it falsely overstates a witness' basis for his accusation, these might raise triable issues of constitutional malice in spite of a sufficient foundation for the constitutionally protected publication of the basic charge. Cf. Goldwater v. Ginzburg, 414 F.2d 324, 337 (2nd Cir. 1969), cert. denied, 396 U.S. 1049, 24 L. Ed. 2d 695, 90 S. Ct. 701 (1970); Edwards v. National Audubon Society, Inc., *supra*, at 120; Nader v. de Toledano, *supra*, at 51-54.

Westmoreland v. CBS, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984)

Viewing the evidence in the record in a light most favorable to Brecht, in that the afore mentioned juxtaposed statements by callers “Mark” and “Chris” along with the agreement of Mr. Carlson and Mr. Schram with those statements, misstate the evidence (CP 257-259, 264-265) contained in Mr. Brecht’s court records (CP 347, 324-326) to make it seem more convincing or condemnatory than it is. This is sufficient probative evidence to support a finding of reckless disregard for the falsity of the information and for a jury to conclude that the defendants acted with reckless disregard for the truth.

9. Inherent Improbability Of The Information Being Conveyed: (Citing Herron v. King)

In the case of Herron v. King, the court re-stated:

“Professions of good faith [by the defendant] will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is

the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. St. Amant, at 732.

Herron v. King, 109 Wn.2d 514, 524, 746 P.2d 295 (1987).

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, it is inherently improbable that one could transform a record of a conviction for violating a no contact order (CP 347) and based upon that information alone, come up with a statement that he is a notorious convicted wife beater with multiple assault convictions. (CP 305-306, 257-259, CP 264-265) The fact that these statements were juxtaposed as they were is evidence of reckless disregard because as both the Herron court and the St. Amant court cited above agree that only a reckless man would have put them into circulation.

10. Innuendo. (Citing Herron v. King)

In the case of Herron v. King Broadcasting, the Court stated:

“Here, viewing the evidence in the record in a light most favorable to Herron, there is abundant circumstantial evidence of actual malice. McGaffin's exchange with Deputy Prosecuting Attorney Sebring was extremely hostile. McGaffin threatened to "get" Herron or his staff in a story he intended to broadcast on the evening news because he was angry at their failure to cooperate with his investigation. He then in fact did broadcast a story casting the prosecutor's office and specifically Herron in a very evil and criminal light in a story that contained inexplicable falsehoods. In addition, the general tenor of the story is hostile and even implies that Herron arranged court records to hide his illegal activities. *See Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2nd Cir. 1969) (innuendo can be indicative of actual malice).

...The innuendo in the story that Herron was involved in the racketeering scandal and was not collecting bond forfeitures because his friends and campaign contributors were bail bondsmen is also false.

Herron v. King Broadcasting, 109 Wn.2d 514, 525, 746 P.2d 295 (1987).

Viewing the evidence in the record in a light most favorable to Mr. Brecht, in this instance, the innuendo of the Fisher Defendants' story is that Mr. Brecht is a 'notorious convicted wife beater with multiple assault convictions.' This has been proven false in Section 1 – 'Disproving The Defamatory Allegations – Falsity' beginning on page 9 of this brief. Mr. Brecht asks that the Court consider Section 1 in relation to this area. Combined with all of the other evidence of reckless disregard, there is abundant circumstantial evidence of actual malice.

3. Liability For Defamation Applies Equally To Radio Broadcasts Regardless Of Show Style Or Format.

The trial court stated in its oral ruling on December 29, 2009: See Summary Judgment Hearing transcript (RP 41):

"There is no Washington case on point. When I look at out of state authority, it is clear that with regard to radio talk shows, that they are what they are... it's clearly part of the free speech we enjoy in this country."

There are no laws in the United States with regards to defamation that give deference to a broadcaster on the basis of their format. The following two cases (CP 371): Embrey v. Holley and Starr v. Press Communications, are two out of state, public figure/actual malice cases where a radio station was held liable for the defamatory statements of its employees. These were call-in talk radio shows with similar format to "The Commentators." Both shows would not be characterized as "objective investigatory journalism." They were both call-in type talk shows that existed to provoke comment and controversy:

1. In Embrey v. Holley, 293 Md. 128, 442 A.2d 966 (1982), the call-in radio show was characterized as a, "a zany, whacky, crazy, fanciful morning disc jockey show with some added features, such as the Little News in the Morning where Johnny writes crazy and wild things about current events and makes up a whole lot of things that haven't."

2. In Starr v. Press Communications, 342 N.J. Super. 1, 775 A.2d 678 (2001), at deposition, the call-in radio show was characterized as "largely, while topical and newsie, very entertainment driven." He defined entertainment driven as "[n]on-political, not so much serious debate of issues, non-public affairs, more humor-based."

In both cases, the court carefully considered and weighed the needs for First Amendment protection against needs for reputation protection.

CONCLUSION

The trial court granting of summary judgment was error because it assigned special rights for the radio show to defame which do not exist. It failed to hold the Defendants accountable to established legal standards under U.S. and Washington defamation law. Mr. Brecht respectfully requests the Court of Appeals to reverse the Trial Court's December 29, 2009 summary judgment order and remand this case for trial.

Respectfully submitted this 16th day of June 2010.



PAUL BRECHT
Appellant Pro Se

DECLARATION OF MAILING

I declare under penalty of perjury, according to the laws of Washington State, that on the date written below, I mailed a true and correct copy of this Brief of Appellant with first class postage prepaid to the Attorneys for the Respondents and Defendants as addressed below:

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COMMUNICATIONS SECTION